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January 17, 2011

Board President David Chiu
and Members of the Board of Supervisors
c/o Ms. Angela Calvillo
Clerk of the Board of Supervisors
City of San Francisco
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Via Personal Delivery and E-Mail (Angela.Calvillo@sfgov.org)

Re: Appeal of Certification of Final EIR and Adoption of CEQA Findings 34th
America's Cup and James R. Herman Cruise Terminal and Northeast Wharf Plaza
Projects (Case No. 2010-0493E) *[[Errata Corrected]]*

Dear President Chiu and Supervisors:

I write on behalf of appellants San Francisco Tomorrow, Golden Gate Audubon Society, Waterfront Watch, Telegraph Hill Dwellers and the Sierra Club to supplement their notices of appeal of the Planning Commission's certification of the Final Environmental Impact Report ("EIR") for the 34th America's Cup and James R. Herman Cruise Terminal and Northeast Wharf Plaza Projects ("Project") and to confirm their continuing objections to the City's violation of the California Environmental Quality Act (CEQA) and the City's Administrative Code regarding this Project.

The City has failed to correct the array of procedural and substantive violations of CEQA raised in Appellants' comments to date, including those raised by them as participants in the Americas Cup Environmental Council. Accordingly, Appellants hereby incorporate by reference and re-raise each and every objection to the EIR presented to the City to date as if set forth in full in this letter. In addition, this letter summarizes a number of the EIR's major deficiencies.

1. The Planning Commission Violated CEQA By Certifying the EIR as "Project-Level" Environmental Review for Granting Long-Term Development Rights to the Authority.

The Host and Venue Agreement includes provisions that provide the America's Cup Event Authority LLC with the long-term use and rights for development of the following sites: Piers 30-32, Seawall Lot 330, and Piers 26, 28, 19, 19 ½, 23 and 29 after conclusion of the AC34 race events, depending on the level of infrastructure investment. However, neither the Event Authority nor the City currently has specific plans for development of any of the venues that may be subject to Disposition and Development Agreements (DDAs). The FEIR acknowledges that Project's long-term development plans are entirely vague:

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There are no specific development proposals under consideration at this time at any of the potential long-term development sites. Other than Seawall Lot 330 and Piers 30-32, the number of sites that may be subject to long-term development rights under the Host Agreement will not be known until the full extent of the Event Authority's investment in infrastructure is known.

(C&R, page 12.6-22.)

The Planning Commission's certification of the EIR's assessment of the impacts of granting the Authority long term development rights as "project-level" rather than "program-level" environmental review is an unlawful attempt to evade full CEQA review of those long-term development projects. A project-level EIR is adequate only if it 1) includes an accurate and stable description of the "whole" of the project; 2) includes an accurate and complete description of the affected environment; 3) fully discloses and considers the project's cumulative effects; 4) does not defer development and adoption of mitigation measures until after project approval; and 5) discloses "significant new information" required to fully understand and comment on the project's significant adverse impacts. Here, the EIR meets none of these requirements. (See, e.g., *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316 ["The 1981 ARM Plan EIR accurately defines itself as a program EIR. It was not focused narrowly on a specific development project, but instead addressed the environmental effects of a complex long-term management plan for obtaining future supplies of aggregate resources from existing and potential resource areas county-wide, and of the ordinances and standards necessary for implementing that plan."].)

When an agency prepares a program-level EIR pursuant to CEQA's "tiering" provisions, future environmental review of site-specific development proposals under a plan is required. (§§ 21068.5, 21093, 21094; Guidelines, § 15152, 15168.) The tiering process provides the flexibility necessary for an agency to review and approve broad plans prior to the development of site-specific projects-it recognizes that the detailed, site-specific information necessary for full CEQA review may not be feasible at the time of plan approval, but ensures that all significant impacts will be disclosed and mitigated before the plan is implemented. (See *id.*) In contrast, CEQA review following a project-level is required only in those narrow circumstances where "significant new information"-such as a major departure from a proposed project or revelation of a previously unknown impact-necessitates "subsequent" or "supplemental" review. (§ 21166; Guidelines, §§ 15062-15064.) Review under section 21166 rests on the presumption that a prior EIR has accurately disclosed, analyzed, and mitigated the project-level details of the "whole" of a CEQA project and is, accordingly, severely limited. By preparing a "Project" EIR for the Plan, prior to the development of site-specific projects, the City dramatically diminished its CEQA obligations and unlawfully tilted the future playing field in favor of the Plan's developers and against future Boards of Supervisors and the public.

Once an agency decides to proceed with project-level CEQA review, it must provide

sufficient detail and specificity in its EIR to meaningfully disclose the nature and extent of each project activity's impacts that would allow the lead agency to adopt, at the time of approval, a Mitigation and Monitoring Plan, that includes the site- and project-specific, enforceable mitigation measures that will be implemented to reduce each specifically identified project impact. (§ 21086.1.) By certifying the EIR as constituting project-level CEQA review, the City has not merely unlawfully "deferred" disclosure and mitigation of impacts of all of the activities and phases constituting the "whole" project (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 195), but has affirmatively attempted an end run around CEQA's "fair argument" standard for the preparation of tiered environmental review. (§ 21094(c); Guidelines, § 15152(f); *Sierra Club v. County of Sonoma*, 6 Cal. App. 4th at pp. 1316-1318).

The "fair argument" test is derived from section 21151, which requires an EIR on any project which "may have a significant effect on the environment." That section mandates preparation of an EIR in the first instance "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." [citation] If there is substantial evidence of such impact, contrary evidence is not adequate to support a decision to dispense with an EIR. [citations]; Section 21151 creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. [citations] For example, if there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR. [citations] (*Sierra Club v. County of Sonoma*, *supra*, 6 Cal. App. 4th at 1316.)

In contrast, CEQA provides that once a project-level EIR is certified, no subsequent or supplemental EIR for that project may be required by any agency, unless one or more of the following events occurs: (a) substantial changes are proposed in the project which will require major revisions of the EIR; (b) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the EIR; or (c) new information, which was not known and could not have been known at the time the EIR was certified as complete, becomes available. (CEQA Section 21166.) The City's certification of its EIR as a project-level CEQA document, when it is not, is calculated to tilt future judicial review against the environment, the public and future Boards of Supervisors, by allowing the developer to block any such review or mitigation requirements so long as any substantial evidence supports the developer's self-interested view that there are no changed circumstances, regardless of the amount and weight of evidence the City and public have to the contrary. As noted in *Sierra Club v. County of Sonoma*, *supra*, 6 Cal.App.4th at p. 1320: "[S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired [citation], and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process. [citation] Under section 21166, an agency's determination not to require a subsequent EIR must be based on substantial evidence in the record; if there are conflicts in the evidence, their resolution is for the agency. [citation]." (emphasis added).

The *Sierra Club* court summarized the differences between sections 21151 and 21166 as follows:

A court reviewing an agency's decision not to prepare an EIR in the first instance must set aside the decision if the administrative record contains substantial evidence that a proposed project might have a significant environmental impact; in such a case, the agency has not proceeded as required by law. [citation] Stated another way, the question is one of law, i.e., "the sufficiency of the evidence to support a fair argument." [citation] Under this standard, deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. [citation] [] But when a court reviews an agency decision under section 21166 not to require a subsequent or supplemental EIR on a project, the traditional, deferential substantial evidence test applies.

(*Sierra Club v. County of Sonoma, supra*, 6 Cal.App.4th at pp. 1317-18.)

Here, the EIR's conceptual approach to the Authority's long term development rights would not cause great concern if the EIR had been certified as program-level CEQA review, precisely because a "tiered," project-level EIR would be required under CEQA's "fair argument" standard, as each development phase is actually proposed, reviewed and approved. The Planning Commission's project-level EIR certification gives the developer a strong hand to unilaterally block the preparation of EIRs for any project exercising its long term rights by producing any substantial evidence that no significant impacts will occur, regardless of the amount and weight of any evidence to the contrary.

The responses to comments asserts that "The Host Agreement directs that any such future development plans and uses would be required to undergo separate environmental review to comply with CEQA, when site-specific development program details are proposed." C&R, p. 12.6-22. This response is disingenuous because it ignores the distinction between CEQA review consisting of an "addendum" under CEQA section 21166 concluding that no subsequent EIR is warranted versus a subsequent EIR under CEQA sections 21094(c) and 21151.

2. The EIR illegally defers the development of mitigation measures to reduce significant impacts from granting Long-Term Development Rights to the Authority.

As to unknown future projects that will result from the long-term development rights granted to the Event Authority, the EIR illegally defers the development of mitigation measures and excludes public review opportunities with respect to the future development of Piers 26, 28, 19, 19 ½ and 23. See Comment O-WW.

For example, Mitigation Measure M-LT-CP: concedes that performance standards or criteria are not specified; they will be "will be developed" later:

"To mitigate potential impacts on historic piers that may result from the future long-term development for which there are no design details available at this time, the Port will develop design and performance criteria to guide the proposed improvements so that the work would be consistent with Port Resolution 04-89, which requires review of proposed projects for consistency with the Secretary's Standards. These design criteria and performance measures will seek to address the character defining features of typical historic pier structures that may be impacted by the proposed work."

The performance criteria may include items such as the following:

1. All proposed repairs, alterations and improvements would be subject to Port Commission Resolution No. 04-89, which requires all projects on Port property within the Embarcadero Historic District to be reviewed for consistency with the Secretary's Standards.
2. The proposed construction of accessible offices or mixed use in the bulkhead shall attempt to retain the sense of open interior spatial qualities of the bulkhead and pier shed so as to maintain the sense of the historic volume. The build-out of offices should avoid obstructing existing windows and doors and obscuring the interior structural elements such as columns and trusses."

Because this mitigation measure fails to specify the specific performance standards that the measures must achieve, the DEIR illegally defers the development of the specific mitigation measures described for the reasons described below.

First, as explained in my August 25, 2011 comment letter on the DEIR (Comment O-WW) submitted on behalf of Waterfront Watch, the case law regarding the illegal deferral of the development of mitigation measures to reduce a project's identified significant effects is well established. The general rule is that where an EIR identifies one or more significant environmental effects, the EIR's identification and discussion of mitigation measures may not rely on mitigation measures to be developed after project approval except in the limited circumstances where: (1) the mitigation measures require compliance with other existing regulatory requirements; or (2) "[F]or kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process . . . , the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1394-1395 [emphasis added].) "Reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking...." (*Communities for a Better Environment v. City of Richmond* ("CBE v. Richmond") (2010) 184 Cal.App.4th 70, 92.)

Second, this measure relies in part on the unproven assumption that future projects would be reviewed for "consistency with the Secretary's Standards." As discussed our August 25, 2011 comment letter, the Secretary's Standards are not performance standards and "compatibility" is an aesthetic judgement, not an objective performance standard the achievement of which can be objectively measured. Consequently, it is not possible to judge whether this mitigation measure will be effective in either substantially reducing significant impacts or reducing them to less-than-significant. Therefore, it does not fall within the exceptions to the general rule against deferring the development of mitigation measures set forth in Gentry.

3. The EIR Fails to Lawfully Assess Water Quality, Public Safety and Recreational Impacts in Aquatic Park.

The fails to lawfully assess or respond to comments submitted by America's Cup Environmental Council (ACEC), the National Park Service (NPS) and the Dolphin Club regarding potentially significant impacts on water quality, public safety and recreation from extensive dredging and other soil disturbing activities, especially in Aquatic Park. With regard to in-water construction activities including dredging, anchored moorings, pile driving and floating dock and barge installation, the DEIR states:

These in-water construction activities would result in short-term disturbance of localized Bay sediments, which could result in adverse water quality effects because the sediments may contain chemicals from historic activities, and disturbance of the sediments could temporarily increase turbidity and resuspend these sediments in Bay waters.

(DEIR page 5.16-63.)

The National Park Service noted in its comment letter that: "Additional moorings and increased yacht discharges at Fort Mason would disturb marine sediments and create water quality issues...."and further that: "Additional moorings in Aquatic Park could disturb sediments and affect water quality."

The Dolphin Club and South End Rowing Club stated in its comment letter that: "The installation, either permanent or temporary, of a large video screen on a floating platform and the associated devices such as a cable for electrical supply, and the mooring of large concrete blocks potentially connected can have a heavy ecological impact to Aquatic Park, the Marina and the Piers. Such installations will modify the currents today established in Aquatic Park and the associated dredging activity may result in moving large quantities of sediments. This would disturb the toxic heavy metals and other pollutants known to be trapped in the mud and sediments of Aquatic Park and lead to a pollution event in Aquatic Park and in the adjacent areas, Marina and Piers. These impacts are not addressed."

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America's Cup Environmental Council commented in its letter on the DEIR that the dredging operations "will result in significant short-and long-term impacts to benthic communities and disturbance to contaminated sediments, which shall make available for biotic uptake a number of pollutants known to be found in elevated concentrations at the proposed dredging sites." ACEC further stated that the EIR should include an analytical analysis of bay sediment in areas where dredging and installation of moorings are proposed to occur.

The FEIR's response to these comments is inadequate in concluding that:

water quality effects related to short-term disturbance of sediments during the installation of moorings and pile driving would be less than significant because they would be temporary and, consistent with the requirements of a new Section 10 permit issued by the Corps [of Engineers] and a water quality certification from the RWQCB, the project sponsor would implement best management practices such as the use of silt curtains to minimize water quality effects during in-water construction activities. Therefore, with compliance with permitting requirements, there would be no adverse effect on human health or aquatic life as a result of changes in water quality due to sediment disturbance, and no mitigation is necessary."

(Response HY-5, page 12-22-12.)

First, the fact that this effect is "temporary" does not mean it is less-than-significant nor excuse the EIR from analyzing the contaminated sediments in Aquatic Park and other locations where dredging and installation of moorings will occur, the disturbance of which could result in significant short-as well as long-term impacts on water quality and its health impacts on recreational users. Impacts are not insignificant simply because they are short-term. Moreover, it is improper to assume that the Project is temporary when the DEIR recognizes that if the "home team" wins the AC34 events, the event may stay in San Francisco in future years. (See DEIR p. 3-93; Comment O-WW, p. 47.)

Second, it is well-settled that compliance with other regulatory standards, here a Section 10 permit to be issued in the future by the United States Corps of Engineers and a future water quality certification from the Regional Water Quality Control Board (RWQCB), cannot be used under CEQA as a basis for finding that a project's effects are less than significant, nor can it substitute for a fact-based analysis of those effects in the EIR. (See Comment O-WW, p. 29 and case law cited in footnote 7.)

Specifically as to Aquatic Park, not only does the final EIR fail to quantitatively analyze the contaminated sediments of Aquatic Park cove that would be disturbed, but it also fails to consider the air pollution and possible diesel fuel leaks from the operation of the JumboTron. The final EIR fails to disclose and consider the fact that Aquatic Park was the historic site of a the Selby Smelter run by the Selby Smelter and Lead Company, which for twenty years from 1865-1885 discharged

highly toxic materials into Aquatic Park .

Because the EIR finds the impacts less than significant, it concludes that no mitigation is necessary. Yet the final EIR presents a "preliminary" site plan for Aquatic Park, which proposes a 100-150-foot wide "clear zone" around the perimeter of the of the cove - around the edge of the proposed AC34 boat exhibitions/video barge -- for swimmers, rowers and kayakers. (Figure 11-10, page 11-50.) This "preliminary" site plan does nothing to address water or air quality impacts of the giant diesel-generated video barge, nor is it a substitute for a fact-based analysis of the impacts of disturbing contaminated bay sediment. As pointed out in the letter to the Board of Supervisors from the South End Rowing Club and Dolphin Club, this preliminary "clear zone" is not a safety improvement. Not only do swimmers kayakers, and rowers move in all directions in Aquatic Park, depending on the tides, water conditions and weather, but the "clear zone" is flawed in two other ways:

- (a) There are no designated boat ingress/egress channels, which potentially enables boats to cross the so-called safe zone with impunity at both openings to the Cove (between Muni Pier and the west end of the breakwater, and between the breakwater and Hyde Street Pier);
- (b) At low tide, it effectively pushes swimmers onto shoreline rocks and exposes swimmers to underwater hazards adjacent to the Sea Scout boathouse in the Cove."

There is no question that the proposed JumboTron in the waters of Aquatic Park represents a significant impact on the regular recreational users of this waterfront treasure that has not been adequately considered or mitigated in the EIR.

4. Air Quality Impacts

With respect to the Project's significant impacts on Air Quality, the EIR (1) improperly rejects feasible mitigation measures, (2) underestimates localized impacts of shore-side power decommission, and (3) fails to present evidence that its proposed mitigation measures are feasible and capable of being implemented.

One of the most significant impacts of the AC34 and Cruise Ship Terminal Project is to the air quality of the City and the Bay Area. The EIR identifies the short- and long-term and cumulative impacts on air quality as "significant and unavoidable" yet underestimates their real impact, avoids recommending feasible mitigation measures that would lessen these impacts, and includes mitigation measures without real teeth.

These "significant and unavoidable" impacts to air quality - the numerous violations of air quality standards and substantial concentrations of toxic air contaminants to which the citizens will be exposed -- are listed in the Planning Commission motion certifying the EIR which is the subject

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of this appeal. (See Planning Commission Motion, Section 8.A.j, k, l and m; Section 8.C; Section 9.A.b; and Section 9.B.d, on pages 3 through 5.)

CEQA requires that all feasible mitigation measures must be implemented to minimize or avoid these significant impacts on air quality. Unfortunately, as explained below, the EIR rejects a feasible mitigation measure recommended by the Bay Area Air Quality Management District (AQMD); ignores a significant increase in localized impacts from decommissioning the shoreside power facility at Pier 27; and fails to provide evidence that the mitigation measures it does propose are financially feasible and capable of being implemented as required by CEQA.

- a. **The off-site mitigation program recommended by AQMD is feasible and should be included as a mitigation measure in the EIR and required as a condition of project approval.**

According to a December 15, 2011 letter from the AQMD to letter to Bill Wycko on the final EIR (attached as Exhibit 1 hereto and incorporated by reference), the amount of the Project's significant air pollutant emissions estimated to be generated from operational-related activities associated with AC34 in 2012 and 2013 could be fully mitigated through an in-lieu payment to an off-site mitigation program. The BAQMD states that an offsite mitigation program is feasible and can demonstrate a direct nexus and rough proportionality to the impacts identified in the EIR.

According to the BAQMD's letter:

The off-site mitigation program recommended by the District would be used to fund projects that replace older, high emitting, gasoline powered harbor craft (commercial and recreational) engines operating in the Bay Area with newer, cleaner, more efficient engines, thereby removing ROG and NOx air pollutant emissions from the San Francisco Bay Area Air Basin (SFBAAB) from the exact sources of emissions that resulted in the significant and unmitigable impacts identified in the DEIR and FEIR. The amount of emissions targeted for the offsite mitigation program would be the amount of emissions estimated to be over the District's significance thresholds.

A similar offsite mitigation program was implemented recently by the District through a the Conoco Phillips EIR settlement agreement with the Attorney General's office...The District is positioned to operate an offsite mitigation program for the AC34 event.

This mitigation measure proposed by the AQMD was improperly rejected by the EIR and should be added to the Mitigation and Monitoring Report to be implemented (and funded) by the America's Cup Event Authority as a condition of Project Approval.

b. New information regarding more severe, significant air quality impacts from decommissioning shore-side power at Pier 27 requires recirculation of a revised Draft EIR.

The final EIR revealed that a much higher number of cruise ships with shoreside power capability are expected to call at the Port while the shore-side power is decommissioned than was previously assumed in the Draft EIR. The number of shore-side power-capable cruise ships increased from 17 (in the DEIR) to 40 cruise ships (in the FEIR) for the years 2012, 2013 and 2014, which means a corresponding increase in the number of cruise ships during that period that would generate air pollutant emissions by use of those cruise ships' auxiliary engines when docked. (C&R, page 11-21 and 11-22.) The increase in air emissions associated with the loss of shore-side power at Pier 27 represents a more than 100% increase in emissions than that assumed in the DEIR.

Although the FEIR finds that this significant increase in air pollutant emissions from cruise ships would be off set by a revised estimated reduction in the number of spectator and race support vessels, the AQMD disagrees with this conclusion. As stated in its letter of December 15, 2011 (Exhibit 1):

[T]he FEIR does not clearly demonstrate why the revised estimates of spectator and support vessels are more accurate than those presented in the DEIR. The increase in the number of ships running their auxiliary engines for hoteling within the SFBAAB will result in more criteria air pollutant emissions, but also result in potentially more localized impacts to sensitive receptors along the Embarcadero from emissions from cruise ships.

As a result, this impact is much more severe than acknowledged in the Draft EIR, requiring recirculation of a revised Draft EIR under CEQA section 21092.1 and CEQA Guidelines 15088.5.

c. The Planning Commission proceeded unlawfully in finding that Impact AQ-4e is "unavoidable."

The FEIR proposes a new mitigation measure to offset the emissions associated with the decommissioning of shoreside power at Pier 27 as a result of the operation of the AC34 events, as follows:

Mitigation Measure M-AQ-4e: Long-term Shoreside Power at Pier 70

The project sponsor shall develop shoreside power at an offsite location that would consist of constructing 12 MW of shoreside power at the Port's Drydock #2 at Pier 70 to serve large cruise, military and other vessels while they are in drydock.

Should it be determined by the project sponsor that this measure is infeasible, the

project sponsor shall document, to the satisfaction of the Environmental Review Officer, that the project sponsor has complied with this mitigation measure to the extent feasible and indicate why full compliance with the mitigation measure is infeasible.

(C&R, Volume 6, page 12.13-37.) The FEIR's states that "due to funding uncertainties regarding this mitigation measure, this impact remains significant and unavoidable." (C&R, Volume 6, page 12.13-37.)

The Planning Commission found the impact this measures addresses to be "significant and unavoidable," and based on that finding, that this impact is acceptable due to the Project's overriding benefits. However, the City cannot lawfully make these findings unless the measure is "truly infeasible." (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 368-369.) Here, the alleged "uncertainty" regarding the feasibility of this measure is artificially self-inflicted by the Authority - its just a question of money. As the AQMD states (at Exh 1, p. 5): "all of the information is available today to determine the feasibility of implementing this measure." Therefore, the City cannot find this impact to be unavoidable.

5. A change in the Project to include Pier 54 in the Authority's long term development rights requires recirculation of a revised Draft EIR.

The Disposition and Development Agreement approved by the Port Commission on December 16, 2011 added Pier 54 to the areas where the City is granting long term development rights to the Authority. This is a major change in the Project description requiring recirculation of a revised Draft EIR under CEQA section 21092.1 and CEQA Guidelines 15088.5.

6. The Port Commission unlawfully approved the Project in violation of City Administrative Code section 31.16.

San Francisco Administrative Code § 31.16(a)(3) provides that "[w]hile the appeal [of the Planning Commission's certification of an EIR] is pending, and until the EIR is affirmed or re-certified as may be required by the Board, the City shall not carry out or consider the approval of a project that is the subject of the EIR on appeal"

Here, Appellants submitted their appeal on the morning of December 16, 2011 before 10:00 a.m. On December 16, 2011, at a public session beginning after 10:00 a.m. the Port Commission approved the Mitigation and Monitoring Plan, Disposition and Development Agreement, CEQA Findings and other Project documents, in violation of section 31.16.

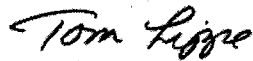
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7. Conclusion.

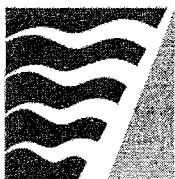
Appellants respectfully request that you grant their appeal, decertify the EIR, decline to approve the Project documents and remand the matter to the Planning Commission to issue a revised Draft EIR for public review and comment.

Thank you for your attention to this matter.

Very Truly Yours,

A handwritten signature in black ink that reads "Tom Lippe". The signature is written in a cursive, slightly slanted style.

Thomas N. Lippe



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December 15, 2011

EXHIBIT 1

Bill Wycko
Environmental Review Officer
San Francisco Planning Department
1650 Mission Street, Suite 400
San Francisco, CA 94103

Subject: The 34th America's Cup and James R. Herman Cruise Terminal and Northeast Wharf Plaza Final Environmental Impact Report

Dear Mr. Bill Wycko:

Bay Area Air Quality Management District (District) staff has reviewed your agency's Final Environmental Impact Report (FEIR) prepared for the 34th America's Cup (AC34), and the James R. Herman Cruise Terminal and Northeast Wharf Plaza (Cruise Terminal) projects. According to the FEIR, the shore-side electrical power installation that was supported by funding from the District and put into place by the Port of San Francisco (Port) at Pier 27 in 2010 will be decommissioned due to construction of the Cruise Terminal and AC34-related activities, and is assumed to be unavailable in 2012, 2013 and possibly 2014 (pg. 12.13-13 & 12.13-18).

District staff has the following specific comments on the changes to the DEIR from the new environmental impact analysis provided in the FEIR.

Updated and Augmented Air Quality Mitigation Measures

The District is pleased to see the mitigation measures that have been either updated or augmented in the FEIR, which will help reduce the significant and unavoidable impacts from construction- and operational-related air pollutant emissions associated with AC34 and the Cruise Terminal.

The most effective mitigation measure identified to substantially lessen the significant and unavoidable impacts from AC34 and the Cruise Terminal is **M-AQ-4e**, electrification at Pier 70. However, as discussed in more detail below, the implementation of this measure cannot be assured due to the wording of the mitigation measure. If **M-AQ-4e** is amended in the FEIR to require implementation (and the language regarding feasibility is removed), then it can be assumed that this measure will take place and substantively reduce the overall impact associated with the decommission of the shore-side power at Pier 27, as well as emissions from operational-related activities associated with AC34. In addition, the recommended implementation of an off-site mitigation program, as discussed below, would not be needed with the assured implementation of **M-AQ-4e**.

Updated Air Quality Assumptions and Analyses

The FEIR includes changes to portions of the air quality analysis presented in the DEIR, including a revision to the project description assumptions regarding the number of spectator and support vessels anticipated at the AC34 events in 2012 and 2013. The

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methodology used in the DEIR, and the FEIR, to determine the number of vessels and spectators is critical to the validity of the subsequent air quality analysis and impact determination.

The updated estimates of criteria pollutants and toxic air contaminants for the anticipated spectator and support vessels in the FEIR are lower than what is presented in the DEIR due to changes in the methodology used to determine the number of spectator and support vessels. For example, the FEIR revised the estimated number of spectator/recreational boats during an average peak weekend day from 2,200 to 800 during the AC34 2013 event, and from 1,833 to 332 during the AC34 2012 event.

Accordingly, the estimated operational-related criteria air pollutant emissions associated with spectator and support vessels were revised in the FEIR and are substantially lower than what is presented in the DEIR.

To develop an attendance projection and estimate visitation patterns, the DEIR utilized the "penetration rate analysis" methodology. The goal of the penetration rate analysis is to not only understand the number of spectators but also to estimate their likely location (for example water vs. land). To develop spectator projections and visitation patterns, the methodology relied on a number of key assumptions and considerations (including the uniqueness of every America's Cup event; the increased visibility of the races and events provided by the geography of San Francisco; etc.) and utilized data from past America's Cup events. According to the DEIR (pg. PD1-6), the penetration rates for AC34 were developed based on the experience of three fairly recent America's Cup events (in Valencia, Spain and New Zealand), the key differentiating qualitative factors between previous America's Cups and AC34, and an examination of attendance at events in San Francisco (including Fleet Week, various parades/celebrations, San Francisco Giants games, etc.). Finally, the DEIR used the penetration rate analysis to estimate the locations from which spectators would likely view the race: on land or water.

The FEIR includes a three-page addendum to the AC34 visitation analysis in the DEIR which provides refined on-the-water visitation estimates yielded from a boat count during the Fleet Week 2011 event. While the FEIR states that the analysis in the addendum builds on the methodology used in the DEIR which is (in part) based on the number of boats for an average peak day during Fleet Week, the number of boats counted during Fleet Week 2011 was found to be much lower than originally estimated and the projections in the FEIR were adjusted. However, the addendum does not provide the methodology for how the Fleet Week 2011 boat count was conducted, nor does the addendum clearly state whether the methodology used for the boat count is the same as the methodology used for the boat counts for previous Fleet Week events, nor is the actual number of boats counted during Fleet Week 2011 included in the addendum. The FEIR also does not include the methodology or assumptions relied upon to refine the number and type of support boats anticipated at the AC34 events.

It appears that the FEIR utilized a different methodology than the DEIR for estimating the number of boats for AC34. For example, as stated on pg. PD1A-3, the DEIR estimated the number of spectators for an average AC34 peak day (amongst other factors) based on Fleet Week boat estimates from previous years. When revising those estimates it appears that the FEIR omits certain elements of the analysis, such as boat count estimates from previous years for Fleet Week, and instead used the data from only one Fleet Week (2011) day rather than from a number of years (as was used in the DEIR). In addition, the DEIR states (at length) the various assumptions, factors and methodology used to conduct attendance projection and visitation patterns for AC34, which includes data from three

recent America's Cup events, and attendance at various events in San Francisco which includes parades, baseball games, Fleet Week and others. The FEIR did not explain how those assumptions and methodology were utilized in the revised spectator and support vessel count estimates, nor did the FEIR clearly demonstrate how the number of boat counts from one Fleet Week day could so drastically alter the estimates presented in the DEIR. The FEIR did not explain why the revised vessel estimates should be considered more accurate than those provided in the DEIR. If a different methodology altogether was utilized to estimate spectator vessels for AC34 in the refined FEIR, it was not stated nor justified in the addendum in the FEIR.

Finally, the revised and much lowered boat estimates in the FEIR appear to be in contrast with the findings of the visitation analysis in the DEIR. The DEIR states on pg. PD1-9 that the overall attendance projection is higher for AC34 than previous America's Cup events, and provides a number of factors considered in the analysis that contributed to the increased attendance estimate. However, while the FEIR found a significant decrease in spectator and support vessel estimates than what was presented in the DEIR, the FEIR did not update or provide further analysis on the number of and/or location of land-based visitors, nor was the total projected attendance for AC34 amended according to the substantial decrease in expected spectator and support vessels.

It does not appear that the revised methodology and assumptions used in the FEIR to estimate the number of spectator and support vessels is consistent with the assumptions and methodology used in the DEIR. The FEIR does not provide full disclosure justifying the changes and providing for an independent analysis of which methodology was the most appropriate. It appears that the revised decrease in boat estimates in the FEIR may underestimate the operational-related criteria air pollutant emissions associated with AC34.

Off-site Mitigation of Criteria Air Pollutant Emissions

According to the FEIR, mitigating criteria air pollutant emissions through an in-lieu payment to an off-site mitigation program does not have an essential nexus and rough proportionality to the Project's significant impact. The District respectfully disagrees.

The DEIR and FEIR identified significant and unmitigable impacts from operational-related criteria air pollutant emissions associated with AC34 activities. Accordingly, all feasible mitigation measures should be implemented to reduce this impact to the maximum extent feasible. In addition to the mitigation measures outlined in the FEIR, the District believes that an offsite mitigation program is feasible and can demonstrate a direct nexus and rough proportionality to the impacts identified in the FEIR.

According to the visitation analysis in the DEIR, a vast majority of the spectators at the AC34 event will be local and from the Bay Area. According to the revised analysis in the FEIR, local private spectator vessels account for approximately 28-35% of the total estimated ROG and NOx emissions from operational-related activities associated with AC34 in 2012 and 2013. The offsite mitigation program recommended by the District would be used to fund projects that replace older, high emitting, gasoline powered harbor craft (commercial and recreational) engines operating in the Bay Area with newer, cleaner, more efficient engines, thereby removing ROG and NOx air pollutant emissions from the San Francisco Bay Area Air Basin (SFBAAB) from the exact sources of emissions that resulted in the significant and unmitigable impacts identified in the DEIR and FEIR. The amount of emissions targeted for the offsite mitigation program would be the amount of emissions estimated to be over the District's significance thresholds. Therefore, an offsite mitigation

program would provide for emission reductions from the same sources of emissions contributing to the significant impact thus providing the nexus and in direct proportion to the amount of emissions above the thresholds.

Assuming a cost-effectiveness of \$8,000 per weighted ton of criteria air pollutants, the cost to offset the emissions from small and private vessels, according to the refined operational emissions analysis for AC34 in the FEIR, is approximately \$1.2 million. This calculation utilizes emissions from the highest year (2013) as the basis for the reductions.

A similar offsite mitigation program has been implemented recently by the District through the Conoco Phillips DEIR settlement agreement with the Attorney General's office. The District received \$4.4 million to offset significant air quality impacts identified in the Conoco Phillips DEIR, in which projects were funded by the District within the Bay Area that achieved substantial GHG emission reductions that otherwise would not have occurred. The District is positioned to operate an offsite mitigation program for the AC34 event.

Shore-side Power Decommission

The FEIR also included updated Cruise Terminal Port Call Assumptions which are based upon confirmed bookings for 2012 by shore-side power-capable ships. The number of shore-side power-capable ships in the updated emissions analysis has increased from 17 (in the DEIR) to 40 cruise ships in the FEIR for the years 2012, 2013 and 2014. According to the FEIR, this would represent an increase in hoteling emissions when compared to the emissions estimated in the DEIR (pg. 12.13-4). This increase in emissions identified in the FEIR associated with the loss of shore-side power at Pier 27 represents a more than 100% increase in the emissions estimated in the DEIR.

The FEIR states that the increased number of cruise ships with shore-side power-capability in 2012 and 2013 would increase criteria air pollutant emissions, but that when considered in combination with the reduced spectator and race support vessel estimates the change would not substantially increase the severity of a significant impact. District staff respectfully disagrees because, as noted above, the FEIR does not clearly demonstrate why the revised estimates of spectator and support vessels are more accurate than those presented in the DEIR. The increase in the number of ships running their auxiliary engines for hoteling within the SFBAAB will result in more criteria air pollutant emissions, but also result in potentially more localized impacts to sensitive receptors along the Embarcadero from emissions from cruise ships.

In addition, according to pg. 12.13-14 of the FEIR, because of the interrelationship of the AC34 and Cruise Terminal projects, the emissions associated with the temporary decommissioning of shore-side power are addressed under several impacts in the FEIR, depending on the scenario. The calculations of criteria air pollutants from the decommissioning of shore-side power were assigned to either the *construction* of the Cruise Terminal or to the *operation* of the AC34 events (to avoid double counting). Therefore, the increase in criteria pollutants associated with an increase in the actual number of shore-side power-capable ships identifies a substantial increase in the environmental impacts in Impact AQ-10, Impact AQ-4, and Impact AQ-19. While additional and augmented mitigation measures were included in the FEIR to reduce the impacts, according to the FEIR, adoption of the mitigation measures will not reduce the impacts to a level of insignificance.

Long-Term Shore-side Power at Pier 70

Mitigation measure **M-AQ-4e** states that the "project sponsor shall develop shore-side power at an offsite location that would consist of constructing 12 MW of shore-side power at the Port's Drydock #2 at Pier 70 to serve large cruise, military and other vessels while they are in drydock". Mitigation measure **M-AQ-4e** also states that should it be determined by the project sponsor that this measure is infeasible, the project sponsor shall document, to the satisfaction of the Environmental Review Officer, that the project sponsor has complied with this mitigation measure to the extent feasible and indicate why full compliance with the mitigation measure is infeasible.

The District believes the implementation of mitigation measure **M-AQ-4e**, if conducted prior to the start of AC34 in 2012, would be a positive step in off-setting the criteria air pollutant emissions associated with the shore-side decommission at Pier 27. However, the feasibility of **M-AQ-4e** should have been assessed and discussed fully in the FEIR. District staff believes that all of the information is available today to determine the feasibility of implementing this measure. As written, implementation of this mitigation measure cannot be assured and therefore may not lessen the significant environmental impacts identified in the DEIR and FEIR. However, if **M-AQ-4e** is amended in the FEIR to require implementation (and the language regarding feasibility is removed), then it can be assumed that this measure will take place and emission reductions will substantially reduce the environmental impact from de-commission of the shore-side power at Pier 27, as well as emissions from operational-related activities associated with AC34, to an acceptable level. Implementation of the off-site mitigation measure identified previously in this letter would not be needed.

District staff is available to assist City staff in addressing these comments. If you have any questions, please contact Jackie Winkel, Environmental Planner, (415) 749-4933.

Sincerely,



Jean Roggenkamp
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